

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

FRANCIS TREMAYNE,
Plaintiff,

v.

CHARLES CROW, ET AL.
Defendants.

No. CV-04-5056-FVS

ORDER DENYING MOTION FOR
SUMMARY JUDGMENT WITH LEAVE
TO RENOTE

THIS MATTER comes before the Court on the Defendants' Motion for Summary Judgment, Ct. Rec. 26. The Plaintiff is proceeding pro se. The Defendants are represented by Daniel J. Judge.

A district court must provide a pro se litigant who is a prisoner with notice of the requirements of Rule 56 prior to granting summary judgment against the litigant. *Klingeale v. Eikenberry*, 849 F.2d 409, 412 (9th Cir. 1988). The failure to provide such notice is harmless only in "unusual" cases. *Rand v. Rowland*, 154 F.3d 952, 961 (9th Cir. 1998). A grant of summary judgment will generally be reversed if not preceded by the required notice. See *Wyatt v. Terhune*, 315 F.3d 1108, 1111 (9th Cir. 2003) (reversing an order of summary judgment where a later court order undermined the effectiveness of *Klingeale* notice); *Anderson v. Angelone*, 86 F.3d 932, 935 (9th Cir. 1996) (reversing order where district court converted a motion to dismiss into a motion for summary judgment without providing *Klingeale* notice); *Lucas v. Dep't of*

1 *Corrections*, 66 F.3d 245, 248-49 (9th Cir. 1995) (same).

2 While the district court remains ultimately responsible for
3 ensuring that a pro se litigant receives notice of the summary
4 judgment standard, the moving party may also provide the notice.
5 *Rand*, 154 F.3d at 960. However, a *Klinge* notice provided by the
6 moving party, rather than the court, "must be in a separate form that
7 the plaintiff will recognize as given pursuant to the court's
8 requirement. It may not be provided within the summary judgment
9 motion or in the papers ordinarily filed in support of the motion."
10 *Id.*

11 The Plaintiff in this Section 1983 action is a prisoner at the
12 Washington State Penitentiary in Walla Walla. The record does not
13 indicate that the Plaintiff ever received a *Klinge* notice concerning
14 the standards for summary judgment as required under Ninth Circuit
15 law. Although the Certificate of Service attached to the Defendants'
16 Motion for Summary Judgment indicates that the Defendants sent the
17 Plaintiff a "Summary Judgment Notice- Warning," such a document was
18 never filed with the Court. As a result, the Court is unable to
19 verify the contents of this document. Even if the Court were to
20 assume that the Summary Judgment Notice was meant to be a *Klinge*
21 notice, the Court has no way to determine if it contains the required
22 elements of such a notice. Under these circumstances, the Court will
23 not rule upon the Defendants' motion for summary judgment until
24 appropriate notice has been given and the matter is ready for
25 decision. Accordingly,

26 **IT IS HEREBY ORDERED:**

ORDER DENYING MOTION FOR SUMMARY JUDGMENT WITH LEAVE TO REOPEN- 2

1 1. The Defendants' Motion for Summary Judgment, **Ct. Rec. 26**, is
2 **DENIED WITHOUT PREJUDICE TO ITS RENOTICE.**

3 2. The Defendants are directed to renote their motion for summary
4 judgment within 5 days of the entry of this order.

5 3. Upon the renoting of the Defendants' motion for summary
6 judgment, the Office of the District Court Executive shall provide the
7 Plaintiff with a copy of the form entitled, "Notice to Pro Se
8 Litigants of the Dismissal and/or Summary Judgment Rule Requirements."

9 4. The Plaintiff shall file his response to the Defendant's
10 motion for summary judgment within thirty-five (35) days of the entry
11 of this order.

12 5. The Defendants shall file their reply within fifty 50 days of
13 the entry of this order.

14 **IT IS SO ORDERED.** The District Court Executive is hereby
15 directed to enter this order and furnish copies to counsel.

16 **DATED** this 26th day of April, 2007.

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18 s/ Fred Van Sickle
19 Fred Van Sickle
20 United States District Judge
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